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2 **IN THE UNITED STATES DISTRICT COURT FOR THE**
3 **WESTERN DISTRICT OF MISSOURI**
4 **CENTRAL DIVISION**

5 **TRINITY LUTHERAN CHURCH OF) Case No. 13-04022-CV-C-NKL**
6 **COLUMBIA, INC.,) Jefferson City, Missouri**
7 **Plaintiff,) September 19, 2013**
8 **vs.)**
9 **SARA PARKER PAULEY,)**
10 **Defendant.)**
11

12 **TRANSCRIPT OF ORAL ARGUMENT**
13 **BEFORE THE HONORABLE NANETTE K. LAUGHREY**
14 **UNITED STATES DISTRICT JUDGE**

15 APPEARANCES:

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31 Proceedings recorded by electronic sound recording, transcript
32 produced by transcription service.

(Court in Session at 10:59 a.m.)

THE COURT: Good morning everyone.

ALL ATTORNEYS: Good morning, Your Honor.

THE COURT: This is the matter of *Trinity Lutheran vs.*

Sara Parker Pauley, Case No. 13-4022. Who's here today to represent the plaintiff?

MR. OSTER: Joel Oster with the Alliance Defending Freedom defending the plaintiff.

THE COURT: All right. And you have some folks with you, if you'd introduce them.

MR. THERIOT: Kevin Theriot also representing the plaintiff.

MR. STANLEY: And Erik Stanley also for the plaintiff.

THE COURT: All right. Welcome and I appreciate you making the trip. I know it's not easy, but it is always something I look forward to, to have lawyers actually in the courtroom rather than just on paper, so.

MR. OSTER: And we have Phil Glenn, from our client, is sitting in the back watching as well.

THE COURT: All right. Thank you. Welcome as well.

MR. WILLOH: Good morning, Your Honor.

THE COURT: And for the defendant.

MR. WILLOH: My name is Don Willoh. I'm here for the State of Missouri.

THE COURT: All right. Thank you very much. And the

1 purpose of this is to have oral argument on the Defendant's
2 Motion to Dismiss. So, since it is your motion, you may proceed.

3 MR. WILLOH: Thank you, Your Honor.

4 THE COURT: Have we given you time limits?

5 MR. WILLOH: No, Your Honor.

6 THE COURT: Okay. Well, we'll see how it goes.

7 MR. WILLOH: Mr. Oster told me he was going to take
8 about three hours.

9 THE COURT: Okay.

10 MR. WILLOH: Just kidding. May it please the Court?

11 THE COURT: Yes.

12 MR. WILLOH: Your Honor, thank you for the opportunity
13 to be here today. The First Amendment provides that Congress
14 shall make no law respecting the establishment of religion or
15 prohibiting the free exercise thereof or abridging the freedom of
16 speech. The Missouri Department of Natural Resources has not
17 violated the First Amendment. The church is welcome to
18 participate at it sees fit in the political and social discourse.
19 Its congregants are welcome to practice their faith without
20 restraint. Neither the church nor its congregants have been
21 subjected to any civil --

22 THE COURT: Slow down, because if you read, I cannot
23 process the information.

24 MR. WILLOH: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. WILLOH: Neither the church nor its congregants have
2 been subjected to any civil or criminal sanctions. The Missouri
3 Department of Natural Resources has not discriminated against the
4 church in favor of other churches. It has made no intrusive
5 investigation into the church's affairs, such as was the case in
6 the *Colorado Christian University* case provided by the plaintiffs
7 recently. Rather, this is a case like *Locke* and *Luetkemeyer*
8 where the State of Missouri's Constitution operates between the
9 joints of the Free Exercise Clause and the Establishment Clause.
10 As the court *Locke* noted --

11 THE COURT: Does the Missouri Constitution prohibit you
12 giving them money or the product?

13 MR. WILLOH: Yes.

14 THE COURT: Okay. In what way? Well, there's two
15 clauses. One says you can't discriminate against us.

16 MR. WILLOH: And --

17 THE COURT: Aren't you discriminating against them
18 because they're religious institutions?

19 MR. WILLOH: No, Your Honor. We can't give them the
20 money, because the Missouri Constitution, the first clause of
21 Section 7 says we can't. The second --

22 THE COURT: But the second clause says you can't
23 discriminate them. How do you reconcile those two?

24 MR. WILLOH: You can't discriminate or favor one
25 religion or one church over another. That's the reading of

1 the second clause.

2 THE COURT: Okay.

3 MR. WILLOH: As the court noted in *Locke* -- (clearing
4 throat) -- sorry. As the court noted in *Locke*, many states wrote
5 their constitution to formally prohibit the use of tax funds to
6 support the ministry. That's from page 723 on *Locke*. Missouri
7 is merely one of those states that prohibits the use of public
8 funds to a religion. Justice Rehnquist wrote, "This is a
9 scarcely novel idea and we can think of few areas in which a
10 state's anti-establishment interests come more into play." In
11 the church's supplemental authority, *CCU vs. Weaver*, the Tenth
12 Circuit was disturbed by Colorado's necessarily and explicit
13 discrimination among religious institutions.

14 THE COURT: What were the facts in *Weaver*?

15 MR. WILLOH: The facts in *Weaver* were -- it's a
16 scholarship money case, whether scholarship money could be used
17 by students who attended religious institutions. As part of the
18 scholarship evaluation process, the State of Colorado would
19 regularly, as I understand the case, for lack of a better word,
20 investigate the institution to determine how pervasively secular,
21 in the context of that case, meaning religious the institution
22 was; the more pervasively secular, the less likely that it was
23 that scholarships would be given to that institution. In this
24 case, the Missouri DNR does not do that. The DNR does not choose
25 winners and losers for the grant money. It simply follows the

1 Missouri State Constitution which provides that we cannot give
2 public money to religious institutions, but we will not choose
3 between them.

4 THE COURT: What's the difference between Weaver and
5 this case? Is it just that Missouri didn't investigate to see
6 the extent to which this product would aid religion? Or is there
7 something different?

8 MR. WILLOH: There are two reasons. That is one of
9 them. The second reason is that the Missouri Constitution does
10 say you can't give public money to aid religion. That's the
11 quite simple difference.

12 THE COURT: Okay.

13 MR. WILLOH: I don't have much more to add. I thought
14 you might have some questions. As the court said in *Luetkemeyer*,
15 I'm going to quote this, "The principles which state what a state
16 may do may not properly be read as a command to do what a state
17 must do." This applies here. The Missouri Constitution
18 prohibits DNR from awarding this grant money. If the framers of
19 the Missouri Constitution had said in their -- in its
20 constitution, scrap tire money can be given to churches, that
21 would have been permissible under the First Amendment. However,
22 what the Missouri Constitution --

23 THE COURT: So, you concede that it would not violate
24 the First Amendment if Missouri chose to give this to a religious
25 institution?

1 MR. WILLOH: I believe that's correct.

2 THE COURT: So, your sole basis for arguing that it is a
3 violation -- it is not a violation of the First Amendment is the
4 fact that you have a state constitution that prohibits it.

5 MR. WILLOH: I think I follow your question. I think
6 the answer is yes. The reason we are here is because the
7 Missouri Constitution prohibits this grant money going to Mr.
8 Oster's client.

9 THE COURT: Okay. All right. Do you wish to reserve
10 any time for rebuttal?

11 MR. WILLOH: Certainly, I would. Five minutes.

12 THE COURT: Five minutes. Okay.

13 MR. WILLOH: Thank you, Your Honor.

14 THE COURT: Tell me what this case is about.

15 MR. OSTER: May it please the Court? Well, first of
16 all, we are here on a Motion to Dismiss. And that is important,
17 because the issue is not whether we can prove our claims, the
18 issue is whether we have pled our claims in this case. And
19 defendants --

20 THE COURT: But are there any factual disputes in this
21 case?

22 MR. OSTER: Well, we're not even to that point. We've
23 done discovery and we do not believe there are going to be --

24 THE COURT: Well, I don't mean -- just on the face of
25 the complaint, is anybody contending that you have not pled the

1 facts correctly?

2 MR. OSTER: No. I don't think anyone is contending we
3 have -- the facts aren't accurate. And, in fact, counsel and I
4 have been working together. We think we're going to be able to
5 present this as stipulated facts. It's just that this is a
6 Motion to Dismiss. And so the issue is not whether -- and we're
7 going to get to later on to what is the state's interest, what
8 are the interests of our client, what is the state's interest in
9 applying its Blaine Amendment against the scrap tire program.
10 And all those are factual issues that --

11 THE COURT: You just referred to the Blaine Amendment.
12 Tell me what you mean by the Blaine Amendment.

13 MR. OSTER: Article I, Section 7 of the Missouri
14 Constitution is what -- I'll try to refer to it as Article I,
15 Section 7. If I use the shorthand of Blaine Amendment, I'm
16 referencing that Article I, Section 7 of the Missouri
17 Constitution.

18 THE COURT: Okay.

19 MR. OSTER: So, first of all, I just want to point out
20 that we are here on the Motion to Dismiss standard which is
21 highly deferential. It's have we pled a case and then we are
22 entitled to try to prove our case through discovery and then at
23 the summary judgment stage. We do have several constitutional
24 claims in this case, but the Court doesn't have to get to the
25 complex constitutional issues as this case can be decided on a

1 narrower issue of state law, because allowing the daycare to
2 participate in the scrap tire program does not violate Article I,
3 Section 7 of the Missouri Constitution, because it is not "in aid
4 of." Now that phrase, "in aid of," has been defined by the --

5 THE COURT: So, forget about the First Amendment, just
6 it's not a violation of state law --

7 MR. OSTER: Correct.

8 THE COURT: -- to give you the products?

9 MR. OSTER: Correct. The Missouri Supreme Court in
10 *Americans United v. Rogers* provided some clarification of what it
11 means when money is "in aid of." And they said it does not
12 include *quid pro quo* transactions. So, if a matter, the
13 transaction is *quid pro quo*, it is not given in preference of the
14 church. And we would maintain that not allowing them to contract
15 with the state would be discrimination against the church.

16 THE COURT: Tell me again the cases you just cited.

17 MR. OSTER: *Americans United v. Rogers*.

18 THE COURT: Okay. These are the Missouri Supreme Court
19 cases.

20 MR. OSTER: Sitting *en banc*, right.

21 THE COURT: Right.

22 MR. OSTER: They defined -- they provided clarification
23 for what the phrase "in aid of" meant and said it does not
24 include *quid pro quo* transactions. In fact, in that case it
25 dealt with tuition scholarships that would -- what would happen

1 is the state would give money in scholarships to a student. They
2 would mail it to the college. And some of these would be
3 religious colleges. And the student would get that check, turn
4 it over to the school. And so the issue is --

5 THE COURT: How is this case different though from the
6 facts there?

7 MR. OSTER: We don't believe it is different. We
8 believe that this --

9 THE COURT: So, they're giving aid to the students who
10 go to the daycare and then the -- they can -- the students can
11 choose which daycare they go to?

12 MR. OSTER: We think this is even --

13 THE COURT: Or is this direct aid to the daycare?

14 MR. OSTER: Well, no. We don't believe this is direct
15 aid to the daycare or indirect aid. We think our case is --

16 THE COURT: Direct payment. Let's say that.

17 MR. OSTER: Right. This isn't even that, we don't
18 believe, because this is a much easier case than what we saw in
19 *Americans United v. Rogers*, because in that case it was indirect
20 funding. And, of course, this is a *quid pro quo* transaction,
21 because when the money is given to the school, the school then
22 has obligations to teach the kids, the students. And so it's a
23 *quid pro quo* transaction. Here, when the State of Missouri
24 contracts with these daycares and these recipients of this
25 program, what the State of Missouri receives as promotional

1 advertising for a scrap program through the media, these are all
2 part of the contract. Promotion of its program to other
3 organizations, so the daycare has to promote it to other
4 organizations. Missouri would receive reduced landfills, because
5 these scrap tires are not going to go to the landfills. They're
6 going to be going to these playgrounds. And then also reduce
7 pollution, which is the whole point of the program in the first
8 place. In addition, now those are all the benefits that the
9 State of Missouri receives under this arrangement.

10 THE COURT: Does your client receive any benefits?

11 MR. OSTER: They would receive benefits of the scrap
12 tire program as well. It would be -- it's a safer material to
13 put on its playground. But our client also receives a lot of
14 obligations -- or incurs a lot of obligations. They must
15 advertise the scrap program through the media. They much teach
16 the students the benefits of recycling. They must promote the
17 scrap tire program to other organizations. Our client agreed to
18 purchase an additional \$10,580 worth of scrap tire if they were
19 -- if the program application was approved. They must pay to
20 install the scrap tires. They must store the scrap tires on
21 their property, reducing Missouri's landfills. And they must
22 also -- then they agree to store the scrap tires on the property.
23 So, the department receives several benefits from this program.
24 This is a *quid pro quo* transaction.

25 THE COURT: Do they receive any benefit, any net

1 benefit? Or are they just doing a charitable act for the
2 community?

3 MR. OSTER: Well, the department receives the benefit of
4 reduced pollution.

5 THE COURT: No, I understand that. I'm talking about
6 your client.

7 MR. OSTER: And our --

8 THE COURT: I think you're arguing that your client
9 doesn't really get any aid. And the reason it doesn't get any
10 aid is it has all of these burdens that come along with the
11 grant.

12 MR. OSTER: Well, I don't -- I guess --

13 THE COURT: So, is there any benefit --

14 MR. OSTER: Oh, yeah. There is a --

15 THE COURT: -- separate from the burdens that they have
16 that make it worthwhile to them to, in fact, get these products?
17 Or is this, in fact, a net loss for them that they're just doing
18 something good for the community?

19 MR. OSTER: Well, I think they are doing something good
20 for the community and I think this is a *quid pro quo* transaction,
21 so.

22 THE COURT: Is it a net loss?

23 MR. OSTER: I don't think at this point in time we can
24 say it's a net loss or a net gain. One of the things that
25 discovery would let us know is the benefits and the obligations

1 to both sides. I think clearly here the daycare wants to be able
2 to store all of these and promote these scrap tires. And it is
3 part of a *quid pro quo* transaction, just like if they were to buy
4 a property. If they were to buy property from the state, they
5 would receive the property, sure, but they also paid a price for
6 the property. Just like in *Americans United v. Rogers* where the
7 students would receive an education, true, but they also -- the
8 school has to provide the education. So, there's constant
9 benefits on both sides and that's why it's a *quid pro quo*
10 transaction. And in those situations the Missouri Supreme Court
11 has said preference is not given -- this is not a situation where
12 preferential aid is given to the organization.

13 THE COURT: Okay. So, which case does the Missouri --

14 MR. OSTER: *Americans United v. Rogers*.

15 THE COURT: Okay.

16 MR. OSTER: And we also cited --

17 THE COURT: Was that factually the same, *Americans*
18 *United v. Rogers*?

19 MR. OSTER: It's very close. And I think the facts in
20 *Americans United v. Rogers* are -- even show -- our facts are even
21 better than in that case, because in that case they actually
22 dealt with education, teaching students, money going to a
23 religious college for that purpose. Here, what we're talking
24 about are scrap tires.

25 THE COURT: It was the state giving it directly to the

1 colleges?

2 MR. OSTER: They gave them money to -- they mailed it --
3 the case outlines how all the transactions happened. The check
4 was actually mailed to the school who then -- but it was in the
5 name of the student. The student then signed the check over and
6 gave it to the school and so the school received it. So, whether
7 you want to call that direct aid or indirect aid, it clearly is
8 aid given to the school. And the court said that even in that
9 situation, it is not aid in violation of the No Preference
10 Clause, because it's a *quid pro quo* transaction. So, it's very
11 -- or I think the facts in our case are even better than in
12 *Americans United v. Rogers*, because this case deals with scrap
13 tires. And so it is part of a *quid pro quo* transaction. This is
14 not a situation where money is being given in aid of a church.
15 Really this is a situation where money is being given in aid of
16 public safety. The scrap tires do not aid a church in the sense
17 that it can be used to teach religious doctrine or engage in any
18 kind of religious instructions. Scrap tires is more akin to
19 sidewalk repairs, street repair, providing fire and police
20 protection. And the Missouri Supreme Court *en banc* already said
21 that type of aid is permissible -- street repair, sidewalk
22 repair, fire and police protection. So, if we have a --

23 THE COURT: So, a sprinkler system in a church would not
24 violate -- if the state paid for the sprinkler system in a
25 church, that would not violate this clause of the Missouri

1 Constitution?

2 MR. OSTER: Yeah. What the court mentioned was sidewalk
3 repair and street repair. And on the situation with the
4 sprinkler, they'd have to know more of the facts as to how that
5 program was going on. If they're just watering the common
6 sidewalk area and grass on the common sidewalk area I would think
7 not. That would be akin to sidewalk repair, street repair, fire
8 and police protection. And the Missouri Supreme Court said that
9 type of aid is permissible. So, if you have two types of
10 interest you want to look at, the broad spectrum of interest, in
11 one side you have the state's funding the devotional training of
12 clergy, which are the facts we had in *Locke v. Davey*, the state's
13 interest there is far different than the state's interest over
14 here which is dealing with street repair and sidewalk repair.
15 And we believe that in this case, providing scrap tires is much
16 more akin to sidewalk repair and street repair than it is the
17 devotional training of clergy. And *Locke v. Davey* was a very
18 narrowly decided opinion. Justice Rehnquist went through great
19 pains to say this only applies to the facts before us. He said
20 when you're talking about the devotional training of clergy, it's
21 a different matter than on this other issue of allowing sidewalk
22 repair and street repair, and in our case, recycled tires. I'd
23 like to direct the Court's attention to another Supreme Court
24 case called *Widmar*. This is a very important case, because it
25 comes out of Missouri and it involves the application of the

1 Missouri Blaine Amendment. And in that case, a religious club
2 was wanting to meet at the University of Missouri of Kansas City
3 to engage in their religious instruction, they have a religious
4 meeting. And the states says no, our constitution does not allow
5 that, because we have a No Preference Clause and this would be
6 indirect aid to a religious organization. And the Supreme Court
7 says that doesn't cut it in this situation. You can't use your
8 state's No Preference Clause as an excuse, carte blanche approval
9 to engage in any kind of constitution violation. And so in our
10 case here we got to look at does a state's interest of
11 prohibiting a daycare from participating in a scrap tire program
12 simply because it's connected to a church, does that warrant
13 violating their constitutional rights. And in *Widmar* the Supreme
14 Court says they don't have carte blanche approval to do that.

15 THE COURT: Would it violate the U.S. Constitution if
16 the state refused to provide refreshments at those meetings --

17 MR. OSTER: It just --

18 THE COURT: -- if they provided refreshments at other
19 people's meetings?

20 MR. OSTER: In that situation, if that was one of the
21 parts of being a school club, a school program, I think that
22 would violate the Constitution if they discriminated against the
23 church in that way. And I think that would violate their rights.
24 Because in that context, you're talking about equal access. And
25 here we're also talking about equal access to this scrap tire

1 program. Can the state discriminate against this daycare in
2 participating in this neutral government program simply because
3 it is connected to a church? And we don't believe that that is
4 allowed. Again, this is -- we are here on a motion to dismiss.

5 THE COURT: Do you have any case on similar facts that
6 have upheld your position, on similar facts?

7 MR. OSTER: I think the closest --

8 THE COURT: What's your closest one?

9 MR. OSTER: Yeah. *Americans United v. Rogers* is
10 definitely a case that's very close to our facts. If not, those
11 facts are even more egregious than the facts we have here.
12 *Widmar* is also one -- is a very good case for us.

13 THE COURT: *Widmar* was a discrimination claim based upon
14 the Missouri Constitution?

15 MR. OSTER: It was a claim where the plaintiffs in that
16 case brought a First Amendment claim saying that the state was
17 violating their constitutional rights. The state defended itself
18 saying that our No Preference Clause gives us the right to do
19 this. And that's about the same posture we have here.
20 Plaintiffs bring in federal constitutional claims -- in addition
21 to our state claim, but -- and then the state in defending itself
22 saying then we have this No Preference Clause which requires us
23 to do it. So, that's the exact same question that was presented
24 to the courts in *Widmar* and the Supreme Court said that no in
25 that instance you can't use the state's No Preference Clause to

1 excuse a violation of your federal constitutional rights. And so
2 part of that analysis is going to be what are the interests of
3 the estate to prohibit the -- as applied to these facts. What
4 are the state's interest in not allowing the daycare to
5 participate in the scrap tire program and what are -- and so
6 that's why, in the motion to dismiss, we haven't even gotten to
7 the facts yet. That is through discovery. And so then after
8 discovery we're going to present motions for summary judgment.
9 Here the only issue is what have we pled.

10 THE COURT: How do you do discovery on what the interest
11 of the state is?

12 MR. OSTER: Well, for instance, has the state acted
13 contrary to their interests. And I can already point out two
14 situations right now where the State of Missouri has acted
15 contrary to their stated interest in maintaining the separation.
16 The first one is *St. Louis University vs. Masonic Temple*, which
17 is -- it's a published case so we can learn from it. But the
18 facts of the case are even more important, because in the facts
19 of *St. Louis University*, the State of Missouri decided it could
20 fund and build buildings for a Jesuit Roman Catholic university.
21 This a Catholic university, it's Jesuit. Their mission statement
22 was to be recognized and known as a Catholic Jesuit university.

23 THE COURT: Was there any distinction between caring for
24 small children with a desire to inculcate Christian values in
25 those small children in your program versus St. Louis University?

1 MR. OSTER: Well, I think that's part of the facts that
2 we have to look at are if the State of Missouri has this high
3 interest in not allowing any kind of funding for religious
4 organizations and then they allow the funding of a religious
5 organization in *St. Louis University* and then also in our
6 *Americans United vs. Roger* case where they allowed the funding to
7 go to a religious school. If they allow the fundings there, then
8 in our situation, we're dealing with a daycare that's connected
9 to a church, why won't the state allow for funding to go in this
10 situation? That is discriminatory. So, the facts are important
11 if we can show that the state has acted contrary to their
12 interest on previous occasions. Then it really undercuts the
13 state's argument that they have this compelling interest when
14 they are regularly or have in the past looked the other way and
15 allowed for funding of these religious organizations. In
16 addition, the whole analysis and inquiry that the state has used
17 as to why it can fund *St. Louis University* is constitutionally
18 problematic. In the *St. Louis* case, the court said -- or the
19 state said we went and we looked at this university and we
20 decided with a religious statement, it was founded for religious
21 purposes. It's known as a Jesuit Roman Catholic university and
22 it has all kinds of religious bylaws and mission statements.
23 Given that, the court said we wanted to look and see if religion
24 so pervaded the environment at the university that we would
25 conclude that it was controlled by a religious creed. So, they

1 were looking at a religious --

2 THE COURT: Is there any debate based on the face of
3 your complaint whether, in fact, the goal of your organization is
4 to promote Christian values in the program?

5 MR. OSTER: Well, I think that it is a fair question of
6 fact as to how the goals of our daycare is --

7 THE COURT: Well, is there any debate? I mean, are you
8 saying that's not the goal?

9 MR. OSTER: No. Well, I guess what we're saying is, how
10 different are the goals of our client from the goals in St. Louis
11 University or these other religious schools that received
12 scholarships in *Americans United vs. Oliver*. How different are
13 these religious goals? Because what the State of Missouri is
14 looking to is how pervasive. Not do you have a religious goal,
15 not do you have a religious mission but how pervasive is it. So
16 they engaged in this pervasively religious analysis that the
17 Tenth Circuit found in *Colorado Christian v. Weaver* who violates
18 the Establishment Cause, because it excessively entangles the
19 state with religion. So, when the state comes in and looks at
20 our client and says, well, no, religion is so pervasive here, but
21 we don't think it's so pervasive in these other contexts, we're
22 going to allow this funding and not allow the funding at, you
23 know, scrap tires at the daycare, then that analysis, that
24 determination excessively entangles the state with religion and
25 violates the Establishment Clause. And so that is part of what

1 discovery will show in this case, is what are the state's
2 interest. What are the state's interest specifically in regards
3 to this case of not allowing a daycare to participate in scrap
4 tires. Scrap tires again are much more akin to street repair,
5 sidewalk repair than it would be the devotional training of
6 clergy. And so the state has a -- they can't claim this carte
7 blanche interest or this wide interest in prohibiting the
8 training of clergy and then apply it to not allowing a daycare to
9 participate in the scrap tire program. Those are totally
10 different interests. So, that's why discovery should be allowed
11 to continue and we argue this case at the summary judgment stage.
12 So finally, this is a neutral program. The state's interest --
13 the program involved here is a spectrum of interest where you
14 have compelling -- you have the -- it's not like the devotional
15 training of clergy. This is more akin to sidewalk repair and
16 street repair. And so we believe that at this point in the
17 litigation, we should be -- we have pled our claims and so we
18 should be allowed to go forward and present our case at summary
19 judgment.

20 THE COURT: All right.

21 MR. OSTER: Thank you.

22 MR. WILLOH: I have four very short points. I will
23 start with the sidewalk repair arguments. I am unaware of any
24 case that says state or government money can't be used for
25 sidewalk repair that would benefit a church. I think that's

1 because no one has sued to prohibit the church from being a
2 beneficiary of sidewalk repair. I don't think there is anything
3 unlawful about a government, federal or state, providing some
4 basic infrastructure if it happens to serve a church incidental.
5 The church is part of the community as well. My point is such an
6 expenditure is within the joints between the Free Exercise Clause
7 and the Establishment Clause.

8 THE COURT: How do I know what's within the joints and
9 not within the joints?

10 MR. WILLOH: I believe that is a case-by-case basis,
11 Your Honor, depending on the facts.

12 THE COURT: Okay. And then is there a need for
13 discovery if it depends on the facts?

14 MR. WILLOH: Yes. But -- but --

15 THE COURT: Yes. If there's a need for discovery, then
16 I shouldn't be granting your Motion to Dismiss.

17 MR. WILLOH: There is the need for discovery in those
18 kinds of cases, but not in this case.

19 THE COURT: Okay. Why is this case different?

20 MR. WILLOH: Because we aren't providing basic
21 infrastructure. It's not about that. This case is about the
22 state's interest as embodied in Article I, Section 7 which says
23 Missouri values the separation of church and state. It's a very
24 bright line there. This is different from a sidewalk repair, an
25 infrastructure situation where everybody benefits. The church

1 will receive a specific amount of money for its purposes. That's
2 different than the incidental benefit of the provision of
3 infrastructure. I want to read Paragraph 15 of the complaint, if
4 I can. It's one sentence long. "Through the learning center,
5 the church teaches a Christian world view to children and members
6 of the church, as well as the children of non-member residents of
7 Boone County and the surrounding area." The mission of the
8 church, and through its daycare, is to promote a particular
9 religious view. There's nothing wrong with that.

10 THE COURT: Is that different from SLU?

11 MR. WILLOH: I'm sorry, Your Honor?

12 THE COURT: St. Louis University?

13 MR. WILLOH: It is vastly different.

14 THE COURT: Is that different?

15 MR. WILLOH: Is it vastly different?

16 THE COURT: How?

17 MR. WILLOH: In the SLU case, there was -- the case
18 refers to pure academic freedom. Its faculty was not required to
19 propose a particular religious viewpoint. Its students were not
20 taught to espouse a particular religious viewpoint. It's a
21 completely different case.

22 THE COURT: Okay.

23 MR. WILLOH: The state's interest -- I want to answer
24 Mr. Oster's question. The state's interest is a high degree of
25 separation of church and state. It's embodied in our

1 Constitution. That's perfectly lawful. The *Locke* case says
2 that. The *Luetkemeyer* district court said that. That is all
3 right. The difference here is that what is permissible for the
4 State of Missouri to do would have been back in 1820, to have a
5 constitutional reading that said scrap tire grant money can go to
6 churches. That would have been fine. But Missouri chose a
7 different path. That's fine, too. It's not unlawful. But the
8 plaintiff would have you believe that because the state -- the
9 church would have you believe that "in aid of" does not apply in
10 this case, but it does apply in this case.

11 THE COURT: That was one of my questions. How does it,
12 in fact, constitute aid? They're saying it's kind of a factual
13 dispute as to whether or not this was of any aid to the
14 institution.

15 MR. WILLOH: I think one thing that's not a fact in
16 dispute is that the church will get a check. That's the
17 difference from the other cases.

18 THE COURT: Okay.

19 MR. WILLOH: Thank you, Your Honor. I don't have
20 anything further.

21 THE COURT: All right. All right. I will take the
22 matter under advisement. It is certainly a complicated area of
23 the law whenever we start talking about the First Amendment or,
24 as you refer to it, the Blaine Amendments to the state
25 constitutions. So, I very much appreciate you all coming in

1 today and the matter is taken under advisement. We have a class
2 here. I'm not going to stay, but if any of you would like to,
3 you know, if there are questions that you feel that you can
4 answer for the class or, you know, your strategy or your styles,
5 obviously I would not want to hear that. But they might very
6 well benefit from having any more information or about being able
7 to ask you questions about this process. So, I am going to
8 recess court, but, Dean Dessem, if there are any additional
9 questions that you might have, please feel free to engage the
10 attorneys if they are kind enough to stay a few moments. All
11 right. Court is in recess. And my staff would come with me.

12 (Court Adjourned at 11:32 a.m.)

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I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceeding in the
above-entitled matter.

/s/ Lissa C. Whittaker
Signature of transcriber

March 14, 2014
Date